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In the Supreme Court of the United States

OCTOBER TERM, 1975

RALSTON PURINA COMPANY, ALLIED MILLS, INC., SECURITY MILLS, INC., and THE JIM DANDY COMPANY,

Appellants,

vs.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, ET AL.,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the United States District Court for the Western District of Kentucky at Louisville, entered on September 26, 1975, which set aside and annulled a certain report and order of the Interstate Commerce Commission, by Review Board No. 4, dated September 21, 1973, and the corrected order of the Commission, by Division 2 acting as an appellate division, dated May 8, 1974, in the Commission's Investigation and Suspension docket No. 8849, "Feed Ingredients Mixed in Transit, Southern Territory".

Appellants submit this jurisdictional statement to show that this appeal presents substantial questions of federal law requiring review on the merits by this court and that the errors of the District Court are so obvious and so flagrant that its judgment should be summarily reversed by this court.[1]

OPINIONS BELOW

The opinion and judgment of the District Court are not reported, but are set out in appendix A to this jurisdictional statement. The report and order of the Commission is not reported but is set out in appendix B to this jurisdictional statement. The Commission's corrected order of May 8, 1974, is also set out in Appendix B hereto (pp. 25-26). The court's order denying remand is set out in Appendix C.

JURISDICTION

The judgment of the District Court from which this appeal is taken was filed September 26, 1975. Appellants filed their notice of appeal on November 21, 1975. Jurisdiction to review the judgment of the three-judge district court is conferred on this court by 28 U.S.C. §1253. *Atchi-*

[1] This is the kind of case in which the judgment below would normally be summarily reversed by the court on appeal by the agency. *United States* v. *Dixie Highway Express*, 389 U.S. 409; *Federal Trade Comm'n* v. *Sewell*, 353 U.S. 969. The Commission vigorously defended its order in the District Court but concluded not to appeal. This case, however, is of great importance to appellants, not only because of the particular situation involved, but also because of its precedential importance in other litigation involving transit, appellants being large users of rail transit. Appellants submit that the failure of the Commission to appeal should not prejudice appellants' rights in the matter. Cf. *Chicago & North Western Ry. Co.* v. *Chicago, Milwaukee, St. P. & P. R. Co.*, 380 U.S. 448.

son, T. & S.F. Ry. Co. v. *Wichita Board of Trade*, 412 U.S. 800; *Bowman Transp., Inc.* v. *Arkansas Best Freight System*, 419 U.S. 969; *Chicago & North Western Ry. Co.* v. *Chicago, Milwaukee, St. P. & P. R. Co.*, 380 U.S. 448; *United States* v. *Saskatchewan Minerals*, 385 U.S. 94.

STATUTES INVOLVED

Section 10(e) of the Administrative Procedure Act, 5 U.S.C. §706, provides in part:

> The reviewing court shall—
>
> . . .
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> . . .
>
> (E) unsupported by substantial evidence . . .

Section 3(1) of the Interstate Commerce Act, 49 U.S.C. §3(1) reads in part as follows:

> It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: . . . .

Section 15(7) of said Act, 49 U.S.C. §15(7) reads in part as follows:

> . . . . At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation,

or practice, after the date this amendatory provision takes effect, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, . . .

Section 15a(2) of said Act, 49 U.S.C. §15a(2) reads as follows:

(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service.

QUESTIONS PRESENTED

1. Where section 15(7) of the Interstate Commerce Act (the Act) provides that carriers shall have the burden of proof to show that proposed tariff changes are just and reasonable and the Commission makes an ultimate finding that the carriers have not shown the changes to be just and reasonable, may such an ultimate finding be set aside on the ground that it is not supported by substantial evidence?

2. Where the Commission, under section 15a(2) of the Act, found that the proposed tariff changes would result in "a net loss of revenue to the respondents despite the assessment of the higher rates and charges and thus will be self defeating", may such a finding be nullified on the ground that the testimony of the shippers as to the traffic they would divert if the proposed changes became effective consisted only of predictions, conjectures, opinions and forecasts?

3. Where a court sets aside a Commission finding that carriers have not shown tariff changes to be just and reasonable, may the court make its own affirmative finding that "the record reveals by substantial evidence that the burden [of the carriers] has been met and that the tariff modification seems just and reasonable under the circumstances" and, based thereon, refuse to remand the case to the Commission on the ground that "it is our considered judgment that a remand of this case to the Interstate Commerce Commission would not serve any useful purpose"?

STATEMENT OF THE CASE

By tariff schedules filed with the Commission to become effective March 30, 1973, the railroad appellees,[2] members of the Southern Freight Association (SFA) proposed changes in their rules governing shipments of vegetable oil meal stopped in transit at points in SFA territory for manufacture into animal feed and reshipment to SFA destinations.[3]

While the proposed new tariffs did not change any rates published in the tariffs as such, a change in the rules with respect to minimum weights required the shippers such as appellants to use higher-rated scales than they had previously been using on transit movements with the result that the charges they would incur would be substantially increased over what they were then paying on the same kinds of shipments.

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[2] Louisville and Nashville Railroad Company, Seaboard Coast Line Railroad Company, Southern Railway Company, and Illinois Central Gulf Railroad Company. These appellees are also referred to as respondents in connection with the proceedings before the Commission.

[3] SFA territory may be described in general terms as the territory east of the Mississippi river and south of the Ohio river.

Appellants are manufacturers of animal and poultry feeds at points in SFA territory and are large users of transit, shipping vegetable oil meals into their manufacturing plants and animal and poultry feeds out. They formally protested the proposed tariffs and the Commission, by order dated March 29, 1973, pursuant to the power conferred on it under section 15(7) of the Act, suspended the operation of the schedules for seven months and entered into an investigation as to the lawfulness thereof.

By a procedural order dated April 12, 1973, the Commission ordered that the railroad respondents file and serve on or before May 29, 1973, any "cost studies and any other studies they expect to submit into evidence at the hearing" and serve such studies on protestants. The respondent railroads filed some traffic studies, but no cost studies, a point of importance in view of one of the court's findings as to the compensatory character of the existing rates. (See *infra*, pp. 14-16.)

After a two-day oral hearing and full briefs on the merits, the Commission issued its report and order of September 21, 1973, in which its ultimate finding was as follows (App. B, p. 24):

> We find that the proposed modification of transit arrangements on vegetable oil, cake or meal, and related articles, when used as an ingredient in animal, fish or poultry feed, on shipments to and within southern territory is not shown to be just and reasonable.

In reaching that conclusion, the Commission fully set forth the contentions of the carriers, which it considered and rejected. It referred to the carriers' argument that the effect on the shippers would be minimal and that the existing rule "departs from their basic idea of transit and

assertedly results in a loss of needed railroad revenue." (App. B, p. 21) It found that while the existing rule did represent a departure from the established or normal transit arrangement, the departure was not "particularly significant" and that the proposed rule also departed from the "normal" arrangement. (App. B, pp. 21-22) Having so found, the Commission continued (App. B, p. 22):

> What is significant in the instant proceeding is that the proposed rule modification results generally in increased rates and charges and the respondents have not presented probative evidence in justification.

The Commission then considered the evidence of protestants (appellants here) as to the effect of the proposed tariff changes on the movement of traffic by rail and held that both the inbound meal and outbound feed would be subject to such diversion that the result would be "a net loss of revenue to the respondents despite the assessment of the higher rates and charges and thus will be self-defeating". (App. B, p. 23)

The Commission then considered and rejected the carriers' second major contention that the proposed rule change would increase car utilization. (App. B, p. 23)

Having concluded that the carriers had not borne their statutory burden of proof to show that the proposed rule change was just and reasonable, the Commission did not find it necessary to consider the protestants' contention that the rule change was also unduly prejudicial to protestants and unduly preferential of their competitors, saying (App. B, p. 24):

> In view of the above conclusion it is unnecessary to consider whether the proposed modification will result in undue preference or prejudice.

After a petition for reconsideration had been filed by the carriers and denied by the Commission, the carriers brought this action to set aside and annul the Commission's report and order. In its opinion, the court rejected the carriers' contention that the Commission erroneously relied on section 15a(2) in support of its conclusion, but it set aside the Commission's report and order on the basis of the following finding (App. A, p. 7):

> With the standards hereinabove enumerated in mind and after a review of the record in its entirety, the Court finds that there is not substantial evidence to support the Commission's finding that plaintiffs have failed to meet their burden of showing that the new tariff schedule is just and reasonable.

The court then proceeded to make its own affirmative finding as to the burden of proof and the justness and reasonableness of the rates, as follows (App. A, p. 7):

> To the contrary, the record reveals by substantial evidence that the burden has been met and that the tariff modification seems just and reasonable under the circumstances.

The court then held (App. A, p. 7):

> Therefore, it is the decision of the Court that the order of the Commission concerning these proposed rate modifications issued in May, 1974, is hereby set aside. Further, it is our considered judgment that a remand of this case to the Interstate Commerce Commission would not serve any useful purpose.

The Commission thereupon filed a motion for amendment of the opinion and a remand of the case to the Commission. This was denied by the court on September 26, 1975. (See appendix C, p. 27).

THIS APPEAL PRESENTS SUBSTANTIAL AND IMPORTANT QUESTIONS OF ADMINISTRATIVE LAW AND PROCEDURE

I.

In holding that the Commission's finding that the carriers had not shown the proposed tariffs to be just and reasonable was unsupported by substantial evidence, the district court established a reading of section 15(7) of the Interstate Commerce Act wholly contrary to its plain and express terms and exceeded its power under the Administrative Procedure Act.

Section 15(7) of the Act provides that, where rates or other tariff changes are suspended by the Commission, the burden of proof to show that such change is just and reasonable shall be on the carrier. This burden constantly remains with the carrier. *Atchison, T. & S. F. R. Co* v. *Wichita Board of Trade,* 412 U.S. 800, 813; *Baltimore and Ohio Chicago Terminal R. Co.* v. *United States,* 279 F. Supp. 270, 274 (N.D. Ill. 1967), aff'd. 389 U.S. 88; *Chicago & E. I. R. Co.* v. *United States,* 107 F. Supp. 118, 124 (S.D. Ind. 1952), aff'd 344 U.S. 917; *Manufacturers R. Co.* v. *United States,* 246 U.S. 457, 479.

To say that a "negative" finding that a carrier has not borne its statutory burden of proof is a finding which requires substantial evidence to support it is not only a contradiction in terms and an absurd construction of the Administrative Procedure Act, but is also an unlawful shifting of the burden of proof to protestants in clear violation of the plain and express terms of the statute. For a court to set aside such a negative burden-of-proof finding on such a ground is a clear indication that the court simply substituted its judgment for that of the Commission as to whether or not the burden had been met. In fact, the court below expressly concedes that that is exactly what it did. (App. A, p. 7; see section II, *infra.*)

The Commission's ultimate finding (App. B, p. 24) was that the proposed transit rule "is not shown to be just and reasonable". That ultimate finding was supported by several subsidiary findings. One was that the variation of the existing transit rules from what the carriers alleged to be "normal" rules was not "particularly significant" and that (App. B, p. 22)—

> "What is significant in the instant proceeding is that the proposed rule modification results generally in increased rates and charges and the respondents have not presented probative evidence in justification.

The Commission also found that there was no sound basis for concluding that the tariff change would result in increased car utilization (App. B, p. 23).

Considering the evidence of protestants (appellants), the Commission concluded that the proposed change would cause diversion from the rails of both inbound meal and outbound feed in sufficient amounts to result in a net revenue loss to the carriers in spite of the higher rates. (App. B, p. 23) The court held that this finding was not supported by substantial evidence, erroneously as we later show. Based solely on that finding, and ignoring all the other findings of the Commission, the court set aside the Commission's ultimate finding on the sole ground that it was not supported by substantial evidence.

Thus the court would establish the principle that the Commission may not find that carriers have not borne their burden of proof under section 15(7) unless protestants present substantial evidence to support the contrary conclusion. Such an interpretation of section 15(7) reduces it to an absurdity. How can there possibly be a requirement that there must be substantial evidence to support a finding, the very essence of which is that there

is not substantial evidence to support the carrier's burden of proof? Obviously a negative finding as to lack of substantial evidence to show rates are just and reasonable need not be supported by substantial evidence that the rates are not just and reasonable. Section 15(7) clearly places the burden of proof on the carriers. The court erred in transferring the burden to protestants.

To the best of appellants' knowledge, this court has never considered this specific point, presumably because the answer is, or ought to be, obvious. A related question as to what findings are necessary to support a "negative" ultimate finding was considered in *Chicago & E. I. R. Co.* v. *United States,* 107 F. Supp. 118, 124-125 (S.D. Ind., 1952), affirmed 344 U.S. 917.

Appellants submit that the lower court's misconstruction of section 15(7) of the Interstate Commerce Act and section 706 of Title 5 U.S.C. presents a substantial federal question which will be raised again if the judgment herein is not reversed.

II.

In substituting its judgment for that of the Commission as to the weight of the evidence, the district court clearly applied an impermissible standard of judicial review and exceeded its statutory authority.

No principle of judicial review is more firmly established than that a reviewing court may not substitute its judgment for that of the administrative agency as to the weight of the evidence. *United States* v. *Pierce Auto Freight Lines,* 327 U.S. 515, 535-36; *United States* v. *Carolina Carriers Corp.,* 315 U.S. 475, 490; *Manufacturers Ry. Co.* v. *United States,* 246 U.S. 457; *Consolo* v. *Federal Maritime Comm'n.,* 383 U.S. 607; *Federal Trade Comm'n* v. *Pacific Paper Ass'n,* 273 U.S. 52, 63; *Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402, 416.

The court's own words conclusively show that, with conscious purpose, it deliberately undertook to substitute its judgment for that of the Commission. At the very outset of its opinion it stated (App. A, p. 1):

> Plaintiffs ask this Court to set aside the report and declare that the modification of the transit agreement [sic] is just, reasonable, and therefore valid.

Having concluded that the Commission's ultimate finding was not supported by substantial evidence, the court then made the following affirmative finding (App. A, p. 7):

> To the contrary, the record reveals by substantial evidence that the burden has been met and that the tariff modification seems just and reasonable under the circumstances.

We submit that it is not within the power of the court to affirmatively hold that the carriers have met their burden of proof when the Commission has specifically held to the contrary. Indeed the standard of review applied by the district court in this case was specifically condemned by this court in *Consolo*, at pp. 618-619:

> In effect, the standard of review applied and articulated by the Court of Appeals in this case was that if "substantial evidence" or "the substantial evidence" supports a conclusion contrary to that reached by the Commission, then the Commission must be reversed. This standard is not consistent with that provided by the Administrative Procedure Act.

Nor is it within the power of the court to pass on the justness and reasonableness of rates and tariffs. Matters relating to the reasonableness of rates and tariffs are within the Commission's exclusive primary jurisdiction. *Texas & P. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426; *United States* v. *Western P. R. Co.*, 352 U.S.

59, 63-65. This rule requires the courts to refrain from "making tariffs," which the court has clearly done here. *United States* v. *Western P. R. Co.*, 352 U.S. 59, 65. As this court said in *Mississippi Valley Barge Line Co.* v. *United States*, 292 U.S. 282, 286-287:

> The structure of a rate schedule calls in peculiar measure for the use of that enlightened judgment which the commission by training and experience is qualified to form. * * * It is not the province of a court to absorb this function to itself. * * * The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body.

Even as to the more restricted issue of traffic diversion, no court, fairly applying the "substantial evidence" test of *Consolo*, could say that the Commission could not reasonably reach the conclusion it did on the basis of the evidence before it.

Protestants (appellants) presented four witnesses who testified in detail as to the nature and amount of their business, the division of the business between truck and rail, the highly competitive nature of the traffic, the existing trucking operations of protestants, the existing trucking radius of such operations, how the trucking radius would be extended by the increased charges, and what effect this would have on the amount of traffic they shipped by rail. (See proceedings before the Commission, Exs. 4, 5, 6, 7; Tr. 105-109, 117-120, 139-142, 155-163, 170-184, 195-205.) In its report the Commission cited much of this evidence as a basis for its findings on traffic diversion. (App. B, pp. 17-18, 22-23).

The court admitted such evidence was "detailed." (App. A, p. 6) It did not say that the Commission could not reasonably conclude from such evidence that the railroads

would suffer a net revenue loss. It simply said this was not substantial evidence because it consisted of predictions, opinions, conjectures and forecasts. (App. A, pp. 6-7)

The Commission has long relied on similar evidence of future traffic diversion to support its findings under section 15a(2) as the effect of rates on the movement of traffic and such findings have had the full support of the courts, a recent important example being *Transit Charges, Southern Territory,* 332 I.C.C. 664, 684 (1968), order sustained with a discussion on this specific point in *Cincinnati, N. O. & T. P. Ry. Co.* v. *United States* (S.D. Ohio, C.A. No. 6992, decided January 12, 1970, unreported), affirmed 400 U.S. 932.

III.

Assuming, arguendo, that the district court was correct in setting aside the order of the Commission, its refusal to remand the case to the Commission is in direct conflict with decisions of this court and presents an important question of administrative law and procedure which is likely to be raised again in the absence of a judgment of reversal by this court.

Based upon its own erroneous finding that the carriers (appellees) had met their burden of proof under section 15(7) and that the rates were just and reasonable, the court determined that a remand to the Commission "would not serve any useful purpose" and it refused to do so. (App. A, p. 8; App. C, p. 27)

Such refusal deprives appellants of their right to findings by the Commission on issues of fact which are crucial to a determination of the lawfulness of the tariff change. Two glaring examples may be cited.

Crucial to its own determination that the proposed tariffs were just and reasonable was the court's own affirmative finding (App. A, p. 7):

> To the contrary, the plaintiffs' evidence shows that the railroads have incurred a loss of revenue from the transportation of meal, and this uncontroverted evidence supports their position. It is clearly established that if there should be a diversion of meal traffic as predicted by the shippers, the carriers would actually be in a better financial position than at present. (Tr. 35, 36; Exhibit 1, p. 13).[4]

The Commission made no such determination and could not possibly make such a finding on the evidence before it. The record references cited by the court are to evidence of costs and revenues not with respect to the traffic here involved but with respect to all feed traffic in SFA territory and *only* on traffic from the transit (manufacturing) point. Even the witness for respondents admitted that (Tr. 29). It is elementary, when dealing with transit traffic, that costs and revenues on the entire movement, both into and out of the transit point must be considered. Even appellees cannot honestly contend that the compensatory character of rates on transit traffic can be determined by considering costs and revenues on traffic only from the transit point.

There is no evidence in the record relating to costs on inbound movements of meal. It was the burden of the carriers to produce such evidence if they wished to argue that the charges in effect were non-compensatory, and they produced none. The failure of the district court to

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[4] The court erred on several grounds. The evidence referred to had nothing to do with meal. It related solely to the transportation of feed from the transit point. There is no cost evidence in the record relating to the transportation of meal into the transit point. Nor was the evidence referred to "uncontroverted." It was vigorously contested (Tr. 27-31). Furthermore, even respondents' own witness admitted the evidence did not show what the court says it did. (Tr. 29).

recognize the difference between cost studies for outbound feed movements alone and for the total transit operation, including the inbound meal, is a clear indication of the wisdom of requiring the courts to defer to the expertise of the Commission on such technical matters which are "not within the conventional experience of judges." *United States* v. *Western Pacific R. Co.*, 352 U.S. 59, 64.

Likewise the district court's refusal to remand the case to the Commission deprives appellants of their right to a determination of their allegation that the proposed tariffs were unduly prejudicial to them and unduly preferential of their competitors in violation of section 3(1) of the Act. In view of the Commission's determination that the carriers had not borne their statutory burden of proof to show that the proposed tariff changes were just and reasonable, the Commission did not reach this question. (App. B, p. 24) The court ignored this point, depriving appellants of any determination on this issue by the Commission, although appellants raised the issue before the Commission, submitted evidence thereon, and argued the point in their brief. Questions of undue preference and prejudice are for the Commission to decide, not the courts. *United States* v. *Chicago Heights Trucking Co.*, 310 U.S. 344, 353; *Interstate Commerce Comm'n.* v. *Alabama Midland Ry.*, 168 U.S. 144, 170.

Assuming, *arguendo*, that the district court was correct in setting aside the order of the Commission, it erred in failing to remand the case to the Commission for further proceedings. *United States* v. *Saskatchewan Minerals*, 385 U.S. 94; *Arrow Transp. Co.* v. *Cincinnati, N. O. & T. P. R. Co.*, 379 U.S. 642; *Federal Power Comm'n* v. *Idaho Power Co.*, 344 U.S. 17.

CONCLUSION

It is respectfully submitted that this appeal presents substantial and important questions of administrative law and procedure requiring review by this court. To allow the decision in this case to stand would be to tolerate and encourage action inconsistent with the judgments of this court concerning the scope of judicial review of orders of administrative agencies.

Appellants further submit, however, that the errors of the district court are so flagrant and so obvious that further briefing and oral argument are not necessary, unless desired by the court. The court should accept jurisdiction and summarily reverse the judgment below for the reasons set forth in points I and II above.

In the event the court concludes that the district court did not err as alleged in points I and II above, the court should summarily reverse the judgment and remand the case to the Commission for further consideration for the reasons set forth in point III above.

Respectfully submitted,

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January, 1976

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

NO. C-74-203-L(B)

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, et al.,

Plaintiffs

v.

UNITED STATES OF AMERICA, et al.,

Defendants.

BEFORE: PHILLIPS, Circuit Judge; BRATCHER and ALLEN, District Judges.

MEMORANDUM OPINION AND ORDER

BRATCHER, District Judge. This is an action by several railroad companies seeking judicial review of a report and order of the Interstate Commerce Commission which found that plaintiffs had not shown a proposed modification of arrangements for the transit of vegetable oil, cake or meal was just and reasonable. Plaintiffs ask this Court to set aside the report and declare that the modification of the transit agreement is just, reasonable, and therefore valid. This Court's jurisdiction is invoked pursuant to

§17(9) of the Interstate Commerce Act (hereinafter the "Act"), 49 U.S.C. §17(9) under 28 U.S.C. §§1336, 1398, 2284, 2321-2325, and under §§702-706 of the Administrative Procedure Act, 5 U.S.C. §§701-706.

The plaintiffs are the Louisville and Nashville, Seaboard Coast Line, Southern Railway, and Illinois Central Gulf Railroad Companies and comprise the major railroads operating in the Southern Freight Association Territory. The defendant, United States of America, is joined by several intervenor defendants, the Interstate Commerce Commission (hereinafter the Commission) and Ralston Purina Company, Inc.; Allied Mills, Inc.; Security Mills, Inc.; and Jim Dandy Company (hereinafter collectively referred to as shipper defendants).

The facts and history of the case in the agency proceedings are as follows: Plaintiffs attempted to modify the transit arrangement which has been in effect since 1959 for the shipping of vegetable oil, cake or meal (hereinafter referred to as meal). Though not technically the case, the effect of such a modification would be to increase the rates for meal transportation.

The long standing shipping arrangement provided for what the industry refers to as a "transit privilege". This term refers to the practice of setting a single rate for shipping commodities from one point to another with a stop at an intermediate point for the purpose of processing or storage. Under this transit agreement, the shipper would be charged a fixed rate from the origin to the final destination point as if it were a continuous movement, without regard to the intermediate stop. This procedure is actually a fiction in that it treats two distinct shipments as though they are one. *Board of Trade* v. *United States*, 314 U.S. 534 (1942).

This practice is advantageous to the shippers in that the rate for a through shipment is less than the rates for the two separate shipments—origin to transit point, transit point to final destination. Further, under the transit privilege arrangement, the rates are based on the weight of the inbound shipment from the point of origin to the transit point rather than the weight of the meal in the outbound shipment, as is the case with the present modification. This is significant in that the inbound shipment of meal weighs more than the usual amount of meal in the outbound shipment of processed animal and poultry feed; and, under the present agreement, the heavier the shipment, the lower the rates.

Thus, the present modification in the transit arrangement has the effect of increasing the rate charged for the transportation of meal.

Upon the protest from the shippers, the Commission, pursuant to §15(7) of the Act, suspended the proposed modification (hereinafter the new tariff schedules) by order dated March 29, 1973. The Commission ordered an investigation and held hearings which culminated in an order that cancelled the proposed tariff schedules. The order was based upon the Commission's report which found the railroads had failed to meet their burden under §15(7) of showing that the change was just and reasonable.

Since the order of cancellation was not a final order, the suspended tariff schedules went into effect on October 31, 1973, at the end of the seven-month suspension period provided for under §15(7) of the Act.

In May, 1974, the Commission issued its final order cancelling the new tariff schedules effective June 10, 1974. However, on June 6, 1974, the Court sustained the rail-

roads' motion for a temporary restraining order, staying the effectiveness of the cancellation and allowing the new tariff schedules to remain in effect. The Court directed the railroads to continue to escrow the funds derived from the increased tariffs, therefore adequately protecting the shippers from damage which might result in the event the Commission's order was upheld.

The argument that the railroads set forth at the Commission hearing was that the present transit agreement was a special one for the shippers of meal and was not the normal agreement for the majority of the shipping industry. The railroads contended that the change is economically warranted or justified by the need to return to the normal transit agreements in use throughout the industry.

The Commission heard testimony that the transit privilege arrangement was set up in order to obtain business for the railroads that had been going to the trucking industry. It then concluded that the change of the agreement would divert a considerable portion of the feed traffic away from the railroads and that the meal traffic would be diverted to a "considerable extent". The Commission reasoned this would be self-defeating in that it would actually result in a loss of revenue for the railroads.

Plaintiffs present three major arguments against the Commission's report. First, plaintiffs contend the finding that the railroads would suffer a loss of traffic and thus revenue from the proposed tariff change is erroneous and not supported by substantial evidence. Second, the plaintiffs argue that the Commission wrongfully relied on §15a(2) of the Act in concluding that the proposed tariff change was not shown to be just and reasoable. Thirdly, the plaintiffs argue that the new schedules are presently

and lawfully in effect and that if the Court sets aside the Commission's order, then nothing further is required to validate the new schedules.

A reading of the Commission's decision reveals to the Court that a major, if not total, reliance for its order was placed upon §15a(2) of the Act which states:

> "(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service."

The Court does not feel that plaintiffs' attack upon this procedure has merit. The cases cited by the United States, such as *Central of Georgia Railroad Co.* v. *U.S.*, 379 F.Supp. 976 (D.D.C. 1974), affirmed 43 U.S.L.W. 3600 (U.S. May 12, 1975), and *Atlantic Coast Line Railroad Co.* v. *U.S.*, 209 F.Supp. 157 (S.D. Fla., 1962), support the argument that §15a(2) standards may be used in a 15(7) proceeding. These cases discuss the fact that Congress' intent was to allow the Commission to apply the factors of effect on the movement of traffic and loss of revenue to the carrier in determining the justness and reasonableness of rates. Thus, it is the opinion of the Court that the Commission acted properly in applying the procedure of §15a(2) in examining the justness and reasonableness of the rates.

The Court must look at the basic essential findings that the Commission is required to make in support of its order. The findings must be supported by substantial evidence as shown in the record. Without this substantial evidence, the Court cannot uphold the decision. *Cincinnati, New Orleans & Texas Pac. Ry.* v. *U.S.*, 229 F.Supp. 572 (D.C. Ohio, 1964), vacated on other grounds 379 U.S. 642 (1965); *Florida* v. *U.S.*, 282 U.S. 194 (1931).

The evidence which the Commission relied upon for its decision consisted of testimony from representatives of the four shipper defendants. Their statements are predictions, conjectures and opinions of what might happen if the transit privilege is cancelled. Further, to the extent that they were made in support of the effort to have the questioned tariff modification cancelled, they are self-serving. This is the only testimony in the record as to the shifting of the traffic pattern. Thus, the record is devoid of any substantial evidence to support a finding that there would be a "considerable" shift in the movement of the traffic pattern from rail to truck or water carriage. Although the prediction from the shippers is fairly detailed, it is nonetheless an attempt to forecast what might occur if the new rates are upheld. See *U.S.* v. *Chicago M.St. P&P R.R.*, 294 U.S. 499 (1935).

The Court notes that nowhere in the record is there a look into the trucking industry to see what changes, if any, are occurring which would affect those rates. It appears to the Court that much more is involved in determining whether there will be a drastic change in the movement of traffic from rail to truck than looking at an increase in rates of only one type carrier.

Further, the Court finds no substantial evidence to support the Commission's finding that the rail carriers

would experience a loss of revenue by increasing their rates. The only basis for their conclusion in this regard is the unsupported forecasts of the shippers. To the contrary, the plaintiffs' evidence shows that the railroads have incurred a loss of revenue from the transportation of meal, and this uncontroverted evidence supports their position. It is clearly established that if there should be a diversion of meal traffic as predicted by the shippers, the carriers would actually be in a better financial position than at present. (Tr. 35, 36; Exhibit 1, p. 13).

The scope of our review of Interstate Commerce Commission orders is limited to a consideration of the record and is not de novo. The reviewing court must give weight to the expertise of the Commission and cannot overrule its decision unless it is found to be arbitrary, capricious, not in accordance with the law, or not supported by substantial evidence. If the decision is found to be supported by substantial evidence of record, then it must be affirmed. 5 U.S.C. §706. *Public Service Commission of W. Virginia* v. *U.S.*, 365 F.Supp. 6 (S.D. W.Vir., 1973).

With the standards hereinabove enumerated in mind and after a review of the record in its entirety, the Court finds that there is not substantial evidence to support the Commission's finding that plaintiffs have failed to meet their burden of showing that the new tariff schedule is just and reasonable. To the contrary, the record reveals by substantial evidence that the burden has been met and that the tariff modification seems just and reasonable under the circumstances.

Therefore, it is the decision of the Court that the order of the Commission concerning these proposed rate modifications issued in May, 1974, is hereby set aside. Further, it is our considered judgment that a remand of this case

to the Interstate Commerce Commission would not serve any useful purpose.

Dated: July 29, 1975.

Harry Phillips
Harry Phillips
United States Circuit Judge

Rhodes Bratcher
Rhodes Bratcher
United States District Judge

Charles M. Allen
Charles M. Allen
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

NO. C-74-203-L(B)

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, et al., Plaintiffs

v.

UNITED STATES OF AMERICA, et al., Defendants

J U D G M E N T

This action having come on to be heard by the Court on the question of whether the report and order of the Interstate Commerce Commission in "Investigation and Suspension Docket No. 8849, Feed Ingredients Mixed in Transit, Southern Territory" should be set aside, and the Court having considered the record in this case and the memorandum briefs filed by the respective parties, now in conformity with the Court's Memorandum Opinion and Order entered July 29, 1975,

IT IS ORDERED AND ADJUDGED as follows:

(1) The corrected Order of Division 2 acting as an Appellate Division, dated May 8, 1974, be set aside and annulled;

(2) The Report and Order of Review Board No. 4, dated September 21, 1973, be set aside and annulled.

September 26, 1975

Harry Phillips
Harry Phillips, U. S. Circuit Judge
Rhodes Bratcher
Rhodes Bratcher, U.S. District Judge
Charles M. Allen
Charles M. Allen, U.S. District Judge

APPENDIX B

This report will not be printed in the permanent series of INTERSTATE COMMERCE COMMISSION reports.

INTERSTATE COMMERCE COMMISSION

INVESTIGATION AND SUSPENSION DOCKET NO. 8849
FEED INGREDIENTS MIXED IN TRANSIT, SOUTHERN TERRITORY

Decided September 21, 1973

Proposed modification of transit arrangements on vegetable oil, cake or meal, and related articles, on shipments to and within Southern Freight Association territory found not shown to be just and reasonable. Suspended schedules ordered cancelled and proceeding discontinued.

Fred R. Birkholz and *John H. Doeringer* for respondents.
Ray Carter, U. J. Hanson, C. W. Moses, H. Dan Roberts, Harold E. Spencer, Donald J. Stone, and *Archie T. Walters* for protestants.

REPORT AND ORDER OF THE COMMISSION REVIEW BOARD NUMBER 4

MEMBERS BROWN, FITZPATRICK, AND SHAW

BY THE BOARD:

Due and timely execution of the Commission's functions under section 15(7) of the Interstate Commerce Act im-

peratively and unavoidably requires the omission of a recommended decision in this proceeding. Requested findings and evidentiary rulings not specifically discussed in this report nor reflected in our findings and conclusions have been considered and found not justified or resolution thereof not necessary for the proper disposition of this proceeding.

By schedules filed to become effective March 30, 1973, and later, the respondent railroads[1] proposed to modify various transit provisions on vegetable oil, cake or meal,[2] and related articles (when used as ingredients in animal, fish or poultry feed), which are subject to more than one rate and varying carload minimum weights by providing that the through rate applicable to the transit tonnage would be the carload rate applicable to the weight in the outbound car from the transit point instead of the inbound car as presently maintained in currently effective tariff schedules. The proposed tariff changes were protested by Ralston Purina Company, Inc. (Ralston); Allied Mills, Inc. (Allied); Security Mills, Inc. (Security), a wholly-owned subsidiary of ConAgra, Inc.; and the Jim Dandy Company (Jim Dandy), wholly-owned subsidiary of Savannah Foods & Industries, Inc. The operation of the proposed schedules has been suspended to and including October 29, 1973. Hearings were held in Washington, D. C., on June 12 and 13, 1973. Briefs were filed by the parties on July 30, 1973. Respondents have the burden of proof pursuant to section 15(7) of the act.

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[1] Railroads in Southern Freight Association territory (southern territory).

[2] Also cottonseed cake or meal; peanut oil cake or meal; soybean oil cake or meal; soybean hulls, ground or unground; alfalfa meal, cubes or pellets.

The mixed feed transit tariffs of the respondents contain a special rule applicable at all feed mills in southern territory which reads substantially as follows:

> On vegetable oil cake or meal when used as an ingredient in animal and poultry feed which are subject to more than one rate and varying carload minimum weights, apply the rate applicable on the weight of the inbound billing surrendered, on the actual weight of the cake or meal used in the outbound shipment of animal and poultry feed.

Essentially, then, the present rule provides that the rate level applying in connection with the inbound weight also applies outbound from the transit point irrespective of the actual weight of the outbound movement. The present through rates on the cake or meal within southern territory, as well as from origins in Illinois Freight Association (IFA) territory and western trunkline (WTL) territory to destination in southern territory, are alternating scales of rates subject to minimum weights of 40,000, 60,000, 80,000 and 100,000 pounds. Rates for representative distances within southern territory are shown in the following table:

Docket 28300 Miles	Col. A 40,000 lbs.	Col. B 60,000 lbs.	Col. C 80,000 lbs.	Col. D 100,000 lbs.
100	33	22	19	14.5
300	49	34	33	28
500	63	53	50	44
700	76	67	60	58
900	91	80	71	70

Rates are shown in cents for 100 lbs. and include increases to and including Ex Parte No. 281.

Very little of the cake or meal moves to destinations in southern territory at rate scales published in connection with the three lowest minima. For all practical purposes, the 100,000-pound scale of rates is the normal level on this traffic. Consequently, under the present transit rule, the weight of the cake or meal in the mixed feed shipment outbound from the transit point is assessed a through rate to the final destination reflecting the 100,000-pound scale of rates even though the average loading of mixed feed in southern territory is less than 80,000 pounds per car, and the cake or meal content of the carload shipment of the feed would be approximately 25 percent of the total weight.

Under the proposed tariff rule change, the 100,000-pound rate will not apply from the origin of the cake or meal to the final destination of the feed when the actual weight of the feed shipment from the transit point is less than that weight. The rates published in connection with the minimum of 40,000, 60,000, or 80,000 pounds, whichever is applicable to the particular shipment, would apply to the through movement from the origin point of the cake or meal to the destination of the mixed feed. Stated otherwise, the weight of the outbound shipment from the transit point would determine the applicable rate on the cake or meal for the through movement and not the weight of the inbound shipment from origin to the transit point. However, the through cake or meal rate will apply only when the rate based on the outbound weight from the transit point produces charges less than other options available to the shipper. This rate will not apply when it results in rates that exceed those computed on the basis of rates published on the mixed feed from original point of the meal or cake to final destination of the feed. Nor will the through cake or meal rate based on the outbound weight of the mixed feed apply when the rate exceeds rates

determined by a combination of the cake or meal rate inbound to the transit point and the non-transit feed rate applicable on the shipment of mixed feed from the transit point to final destination. On the great majority of shipments, the through soybean meal rates will produce the lowest rates.

As stated, the respondent railroads are seeking to modify transit rules applicable in connection with the movement of the cake or meal, when used as a feed ingredient, within southern territory. The manufacture and sale of mixed feeds in this territory is a substantial industry because of the large production of livestock and broilers in the area. The value of livestock and poultry in ten southern States[3] as of January 1, 1971, exceeded three billion dollars. Vegetable oil meals represent from 20 to 25 percent of the ingredients used in animal and poultry feeds. Soybean meal, an important source of vegetable protein, is a major ingredient in animal and poultry feed, and practically all of the record in the instant proceeding is directed to the impact of the proposed modification of the transit rules on the movement of this commodity to and within southern territory.

The significant railroad movement of soybean meal in southern territory commenced in December of 1958 with the publication of commodity rates tied to a carload minimum weight of 80,000 pounds. Later, in 1959, the scales of rates based on 40,000-and 60,000-pound minimum weights were also established. In August of the same year, the railroads published the 80,000-pound scale of rates interterritorially from origins in WTL and IFA territories to

[3] Virginia, West Virginia, North Carolina, South Carolina, Georgia, Florida, Kentucky, Tennessee, Alabama, and Mississippi.

destinations in southern territory. The 100,000-pound scale of rates (which, as indicated, has application to by far the greatest tonnage of the meal) was established effective March 1, 1962. From the time these rates were originally established, the basis for transit on soybean meal, when used as an ingredient in animal and poultry feed, has been the protection of the through rate on the meal if that resulted in lower rates than the through rates on feed. Because of the various levels of rates and minimum weights on soybean meal, a question arose as to which through rate was to be protected. The rail carriers then published the specific tariff item, set forth above, effective September 30, 1959, to remove doubts as to the appropriate through rate to be protected. It has been continued in effect since that date. The schedules under suspension represent the first attempt of the railroads to modify the rule since its original publication.

Respondents urge that the present transit rule represents a departure from established transit principles and results in an unnecessary loss of carrier revenue. Particular attention is directed by the railroads to the fact that the present transit rule is a special rule applicable only in connection with the through rates on vegetable oil cake or meal when used as an ingredient for animal or poultry feeds. The general rule provides that when the weight in the shipment outbound from the transit point is less than the weight covered by the inbound freight bill surrendered as an offset, the shipment is assessed the carload rate that would be applicable for that weight from the initial origin to the final destination. Accordingly, if the outbound shipment weighs 60,000 pounds, the charges would be based on the through rate applicable in connection with 60,000-pound shipments, from origin to final destination. The proposed change in the suspended schedules will

allegedly bring the situation with respect to the cake and meal into conformity with the general rule.

The railroads stress the evidence of record which purportedly establishes that the rates on mixed feed in transit will continue to be just and reasonable under the proposed rule change. Much of this showing is directed to the fact that no change in rates will occur when the outbound mixed feeds move in shipments of 100,000 pounds or more. According to respondents, the proposed tariff change will serve as an incentive for the mixed feed dealers to ship their outbound feeds in larger quantities to protect the lower through rate. Even if the feed shipments continue to move at the current average loadings of some 78,000 pounds, the railroads submit that the governing rates will not result in unreasonable charges. The transit arrangements will continue to be available under the 40,000-, 60,000-and 80,000-pound minimum rates, these latter rates allegedly having been established at reduced levels to meet truck competition. Consequently, it is argued that they are less than the maximum reasonable rates.

While the respondent railroads are aware of the extensive use of the transit rules, particularly by the protestants herein, it is their view that the continued successful operations of these feed manufacturers are not dependent upon the continuation of this tariff arrangement. Particular reference is made by the carriers to the use of trucks in the distribution of substantial quantities of mixed feed from the transit points. Similarly, it is urged that the modification of the transit arrangement as proposed herein will not result in any undue preference or prejudice. Any competitive disadvantage that may be sustained by the protestant feed producers will allegedly be the result of the more favorable location of their competitors rather than the change in the tariff transit rule. It is respon-

dents' position that neither the local feed manufacturers, the principal competitors of protestants, nor manufacturers, located beyond southern territory will receive any undue advantage as a result of the proposed tariff rule change. Tariff modifications similar to those proposed herein were being considered by appropriate rate committees of the railroads in IFA and WTL territories at the time of the hearing in this proceeding. Respondents contend, however, that approval of the proposed transit rule change will not unduly prejudice the transit operators in southern territory, and they direct particular attention to the absence of any probative evidence in the record tending to show that feed manufacturers located outside the South would have any undue advantage even if similar transit changes are not made effective in the other territories.

Finally, the carriers submit that the proposed rule change is not subject to the Economic Stabilization Act regulations and, further, that approval of the proposed schedules will not have any significant effect on the quality of the human environment.

Four manufacturers of animal and poultry feed opposed the proposed modification of the transit rules. Ralston has manufactured the mixed feed for more than 75 years and has plant facilities at 11 different locations in the southeastern States. It also operates a feed plant in Cincinnati, Ohio. All of these plants use the manufacturing-in-transit arrangements presently in effect. The indicated plants have a total annual production capacity of approximately 2.2 million tons, and this production is distributed throughout the Southeast. Allied is also one of the leading producers of the mixed feed. It operates some 30 plants in 37 States including two at Memphis, Tenn., and one each

in Portsmouth, Va., Salma and Asheville, N.C. The latter four facilities ship feed tonnage under the currently-effective transit provisions. This company is building a full-line feed plant at Cordele, Ga., which will also utilize the transit provisions on feed tonnage destined to points in Georgia, Alabama, and Florida. The annual production at the five plants approximates 500,000 tons.

Security has a feed mill at Knoxville, Tenn., with an investment of $2.7 million. The products of this plant are distributed to various locations in six southeastern States. About 45 percent of its production (some 1,500 carloads of feed) moves outbound by railroad of which 90 percent is shipped under transit. Jim Dandy's feed plant at Birmingham, Ala., distributes some 150,000 tons of mixed feed by railroad to various points in the Southeast under present transit arrangements.

The protesting feed manufacturers insist that the proposed rule change will result in increased rates on the soybean meal portion of the mixed feed and, consequently, on the feed itself. This increase will assertedly increase the competitive disadvantage that the intermediate transit feed producers sustain in relation to the local feed manufacturer. The latter have access to the local production of the feed ingredients and, in addition, have available low-level, high-volume, non-transit rates on grain, soybean meal, and other feed ingredients. The increase in annual transportation costs estimated to follow the approval of the rule modification amounts to $15,000 by Security, $50,000 by Allied, $70,000 by Jim Dandy, and $300,000 by Ralston.

Protestants argue that the considered change in the transit rules will necessitate numerous rate checks to determine the lowest rates; will limit maximum car utilization because of the inability to increase outbound loadings of the mixed feeds from the transit point and the corresponding lack of incentive for heavier loadings of the inbound soybean meal; will unduly prefer the local feed manufacturer; and will cause substantial diversion of the present traffic to trucks, with a resultant loss of railroad revenue. For these reasons, the protestants urge that the proposed rule change is not shown to be just and reasonable.

DISCUSSION AND CONCLUSIONS

Transit arrangements in connection with the railroad movement of grain and grain products, soybeans and soybean meal, and feed have been in effect for many years. One of the purposes of transit is to ensure that the outbound movement of product from the intermediate storage or processing plant is by railroad and, in most instances, by the railroad that performed the inbound transportation service of the grain or the ingredient of the feed. Through the use of transit, shipments may be stopped at an intermediate point for processing on the basis of the through rate from origin of the ingredient to final destination of the product. This enables the shippers at intermediate or transit points to compete with each other and also with competitors located at the destination point. In the instant proceeding, for example, the feed manufacturers with facilities located at intermediate locations such as Knoxville or Memphis, Tenn., are able to serve customers located at various destinations in the Southeast, such as Gainesville, Ga., in competition with local feed manufacturers. The intermediate transit operator is in a position to serve customers removed from its feed manufacturing plant because the rates on the principal feed ingredients are assessed generally on the basis of the through rates from origin of the ingredients to the destination of the

feed. The costs sustained by the transit operator and the local manufacturer are not always the same. The last named has the advantage of local production of grain and soybean ingredients and, in addition, has available low non-transit rates on volume shipments of these ingredients from the surplus producing areas of the Midwest. But there are offsetting factors. Transit operators such as the protestants are manufacturers of substantial quantities of feed either at large centrally-located plants or at a number of different facilities. They are able, through economies of production and by use of established brand-name products, to market their mixed feed in extensive areas in competition with various local feed manufacturers.

Under the proposed tariff rule the protestants will lose some of the benefit or advantage they presently have under the transit provisions currently in effect. The through rates on soybean meal, as described earlier, are published in connection with varying minimum weights ranging from 40,000 to 100,000 pounds—the higher the minimum weight, the lower the applicable through rate. Since the through rate (from origin to final destination) will be determined under the proposed modification by the generally lower weight of the outbound shipment of feed (80,000 pounds or less in southern territory) in lieu of the higher weight (100,000 pounds or more) of the inbound shipment of the soybean meal, the protesting transit operators will be required to pay higher through rates on the meal shipped under transit. Respondents correctly note that where the outbound shipments of the feed have a weight of 100,000 pounds or more, the proposed tariff change will not result in any change in the rates. However, the record shows that few, if any, of the feed shipments from the transit points equal that weight. The vast majority of these shipments range in weight from 60,000 to 80,000 pounds.

The current transit rule has been in effect within southern territory for some 14 years. During this period substantial quantities of the soybean meal moved by railroad under transit through protestants' facilities. Although most of the feed facilities were located in the South prior to the establishment of the present transit rule, there have been some plant additions and expansions by protestants under the expectation that existing provisions would be continued. Respondents take the view that the proposed rule change will have a minimal effect on the revenues of the intermediate transit operators. Using examples submitted by protestants, the railroad respondents estimate the increases in rates and charges under the proposed modification of the transit rule to be 10 percent or less depending on the weight of the outbound feed. The 10-percent figure is predicated on a weight of some 61,000 pounds of the feed, a figure less than the average loadings of the feed terminated in southern territory in 1970 of 78,000 pounds. This comparatively small increase in protestants' freight charges is contrasted by respondents with the continuance of a tariff rule which departs from their basic idea of transit and assertedly results in a loss of needed railroad revenue. This is the main thrust of respondents' arguments in support of their position that the proposed tariff rule is lawful and will result in the assessment of rates and charges that are just and reasonable.

The fact remains, however, that the proposed tariff change will require protestants to pay increased rates and charges on the combined shipments of soybean meal and mixed feed to and within southern territory. The present transit rule does represent a departure from the established or normal transit arrangement; but the departure is not particularly significant, since "normal" transit provisions would provide for the assessment of the rates on the

finished product (feed) from the origin of the raw material (soybean meal) to the destination point of the finished product (feed). The proposed modification would also represent a departure from the "normal" transit arrangement, since the rate on the ingredient would continue to be the applicable through rate (though at a higher level) on the soybean meal from its point of origin to the destination of the feed.

What is significant in the instant proceeding is that the proposed rule modification results generally in increased rates and charges and the respondents have not presented probative evidence in justification. The variance in the transit provisions, such as it is, was originally established by the respondents along with reduced levels of rates to attract this particular traffic. At the time, this particular tonnage was being transported by trucks. That the railroads were successful in their efforts is evident from the fact that, in the period extending from October of 1972 through March of 1973, Ralston shipped slightly more than 1 million tons of feed (or 55 percent of total production) by railroad from its facilities in southern territory where transit accounts are maintained. The remainder was transported by trucks. All of the protestants have substantial rail movements of the outbound mixed feed shipments under present transit provisions. Some 45 percent of Security's at Knoxville is shipped by rail, and 90 percent of that tonnage is moved under currently-effective transit provisions. The protestants make extensive use of trucks in the distribution of their mixed feeds in southern territory and indicate that the proposed transit rule, if it becomes effective, will cause a greater utilization of this mode of transport. There is strong support on this record for concluding that these shippers will divert a considerable portion of their feed traffic, from railroad to

trucks, with the establishment of the proposed rule. The record also indicates that, since the proposal would diminish the value of inbound movements, the proposed change would divert to a significant extent the meal traffic to motor or water carriage. The result will be a net loss of revenue to the respondents despite the assessment of the higher rates and charges and thus will be self-defeating.

Nor is there any sound basis in this record for concluding that the proposed tariff change will increase car utilization. The incentive for the greater loadings of the soybean meal (100,000 pounds) to the transit location will be lost because the intermediate feed processor is required to pay the higher through rates applicable on the lighter loadings of the mixed feed (80,000 pounds or less). We are persuaded from the evidence submitted that the feed shipments outbound from the transit location, except in comparatively rare cases of bulk movements in large hopper cars, must be transported in shipments ranging from 60,000 to 80,000 pounds.

Under section 15a(2) of the Interstate Commerce Act, the Commission is required to give consideration to the effect of the rates on the movement of traffic. The effect of the proposed tariff rule is to increase rates, even though no increase is proposed in the line-haul rates themselves. Compare *Transit Charges, Southern Territory,* 322 I.C.C. 664. These intermediate transit operators are, as indicated, presently using trucks to transport substantial quantities of their mixed feed shipments. Since the proposed transit modification will increase the cost of using the railroad service in the movement of the considered traffic, there will be, as we have earlier concluded, a diversion of part of the mixed feed traffic from the respondent railroads. The higher cost of transit on the soybean meal un-

der the proposed rule would also have an effect on the inbound shipments of the meal, particularly at those transit locations having access to movements of this commodity by water carrier. We conclude that the proposed transit rule change has not been shown to be just and reasonable.

In view of the above conclusion it is unnecessary to consider whether the proposed modifications will result in undue preference or prejudice.

We find that the proposed modification of transit arrangements on vegetable oil, cake or meal, and related articles, when used as an ingredient in animal, fish or poultry feed, on shipments to and within southern territory is not shown to be just and reasonable.

We further find that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

IT IS ORDERED, That the respondents herein be, and they are hereby, notified and required to cancel the schedules described in the order entered on March 29, 1973, by division 2, acting as an Appellate Division, on or before 30 days from the date of service of this order, upon not less than one day's notice to this Commission and to the general public by filing and posting in the manner prescribed under section 6 of the Interstate Commerce Act, and that this proceeding be, and it is hereby, discontinued.

By the Commission, Review Board Number 4.

ROBERT L. OSWALD
Secretary

(SEAL)

CORRECTED ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 2, acting as an Appellate Division, held at its office in Washington, D.C. on the 8th day of May, 1974.

INVESTIGATION AND SUSPENSION DOCKET NO. 8849

FEED INGREDIENTS MIXED IN TRANSIT, SOUTHERN TERRITORY

Upon consideration of the record in the above-entitled proceeding, the petition filed November 26, 1973, by the respondents, railroads in Southern Freight Association Territory, for reconsideration of the report of Review Board Number 4, dated September 21, 1973, the joint reply thereto filed December 16, 1973, by protestants, Ralston Purina Company, Inc., Allied Mills, Inc., Security Mills, Inc., and The Jim Dandy Company, respondents' motion to strike a portion of protestants' reply, filed January 14, 1974, and protestants' reply, to that motion, filed February 1, 1974; and good cause appearing therefor,

It is ordered, That respondents' motion to strike a portion of protestants' reply to respondents' petition be, and it is hereby, granted.

It is further ordered, That the petition for reconsideration be, and it is hereby, denied for the reason that sufficient grounds have not been presented to warrant granting the action sought.

It is further ordered, That the order entered in this proceeding on September 21, 1973, which order, pursuant to section 17(8) of the Interstate Commerce Act, was stayed pending disposition of the petition be, and it is hereby, reinstated and modified so as to require the cancellation of the schedules on or before June 10, 1974, with no other change in the requirements of said order.

By the Commission, Division 2, acting as an Appellate Division.

(SEAL) Robert L. Oswald,
Secretary

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, et al., Plaintiffs,

v.

UNITED STATES OF AMERICA, et al., Defendants.

NO. C-74-203-L(B)

ORDER

This cause comes before the Court on the joint motion of the United States and the Interstate Commerce Commission for the Court to amend its Order entered July 29, 1975, and to remand this action to the Commission defendant for further proceedings.

After consideration of the arguments submitted by the parties, we are of the opinion that nothing has been proffered which was not considered by the Court initially; and, accordingly, the Court declines to alter its Memorandum Opinion and Order as entered.

ORDERED: Defendants' motion to alter or amend is hereby overruled.

Dated: September 26, 1975

/s/ *Harry Phillips*
Harry Phillips
United States District Judge
/s/ *Rhodes Bratcher*
Rhodes Bratcher
United States District Judge
/s/ *Charles M. Allen*
Charles M. Allen
United States District Judge

Supreme Court, U. S.
FILED
FEB 17 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1015

RALSTON PURINA COMPANY, ET AL. - Appellants

versus

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, ET AL. - - - - Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY

MOTION TO AFFIRM

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October Term, 1975

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v.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, ET AL. - - - - *Appellees*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY

APPELLEES' MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, Appellees move that the judgment of the District Court be affirmed on the grounds that the questions presented are so unsubstantial as not to warrant further argument.

This is a direct appeal from a memorandum opinion and order of a three-judge United States District Court for the Western District of Kentucky, entered July 29, 1975, and judgment thereon entered September 26, 1975, setting aside and annulling a decision and order

of the Interstate Commerce Commission in Investigation and Suspension Docket No. 8849, *Feed Ingredients Mixed in Transit, Southern Territory.* Appellants also appeal from the lower court's denial of a motion to alter or amend the Court's order and remand the case to the Commission for further consideration. As we shall show, the questions presented by this appeal are so unsubstantial as not to warrant further argument and the District Court's decision should be summarily affirmed by this Court.

OPINIONS BELOW

The lower court's memorandum opinion and order is reported as *Louisville and Nashville R. Co.* v. *United States,* 397 F. Supp. 607 (D.C. Ky. 1975). In addition, this opinion and the Court's order denying remand, as well as the report and orders of the Commission, are attached to Appellants' Jurisdictional Statement as appendices.

QUESTIONS PRESENTED

1. Whether the three-judge District Court erred in setting aside and annulling the Commission's decision and order below.

2. Whether the three-judge District Court erred in refusing to remand the case to the Commission.

STATEMENT

By tariff schedules filed with the Commission to become effective on March 30, 1973, and later, Appellees and all other railroads in Southern Territory proposed to modify certain rules and regulations pertaining to the transit privileges applicable to soybean meal (when used as an ingredient in animal, fish or poultry feed) which are subject to more than one rate and varying carload minimum weights. The transit rule in effect at the time of the filing of the schedules provided that a 100,000 lb. carload of soybean meal could be shipped from its country origin to a transit point at the low 100,000 lb. rates, there be mixed with other ingredients to manufacture feed, which is then shipped to a final destination. When the feed moves from the transit point to final destination, the actual weight of the meal in the feed is assessed the low 100,000 lb. meal rate from country origin to final destination, even though there may be only 10,000 lbs. of meal in a 50,000 lb. shipment of feed.

This rule was an anomaly. The transit rule applicable to *all* other ingredients used in the manufacture of feed provides for the assessment of the higher through feed rate applicable from the origin of the ingredient of the feed to the final destination of the feed, based on the weight of the feed moving from the transit point to the final destination, regardless of the weight of the carload. This feed rate is applied to the actual weight of the individual ingredient in the feed.

Under the rule change involved here, the transit rule applicable to meal was brought into general con-

formity with all other rules applicable to the ingredients in transited mixed feed. Under the new rule, presently in effect subject to a Commission "keep account" order, the through rate on meal continues to be applied to the actual weight of the meal in the feed shipment, but that rate is determined by the weight of the outbound feed shipment and not by the weight of the heavier meal shipment inbound to the transit point.

After oral hearing at which all parties had full opportunity to present evidence in support of their positions, the Commission issued a decision in which it concluded that the proposed modification had not been shown to be just and reasonable.

On appeal, the three-judge District Court for the Western District of Kentucky held that the Commission relied almost totally on section 15a(2) of the Interstate Commerce Act (the Act) to support its conclusion and that the basis for the conclusion was that the rule change would result in diversion of traffic from Appellees with a resulting loss of revenue. It is these findings which purport to support the Commission's ultimate conclusion and which the lower court held to be without the support of the necessary substantial evidence of record. *Louisville and Nashville R. Co.* v. *United States,* 397 F. Supp. 607, 609-10 (W.D. Ky. 1975).

The lower court further held that no useful purpose would be served by remanding the case to the Commission. *Id.* at 610. The Commission moved the lower court to alter its decision and remand the case to the Commission for further consideration. Appellants did

not join in that motion or otherwise support the request for remand. After consideration of memoranda in support and in opposition to the motion for remand, it was denied by the lower court on September 26, 1975.

Appellants, who were the shipper protestants in the Commission proceedings, have taken this appeal. The United States and the Commission do not join in the appeal.

THE QUESTIONS PRESENTED ARE UNSUBSTANTIAL

I

The Lower Court Correctly Held the Commission's Conclusion to Be Unsupported By Substantial Evidence.

Appellants argue, without citation of authority that since the Commission merely concluded that Appellees had not met their burden of proof, this so-called "negative" conclusion need not be supported by substantial evidence, and that the lower court erred in holding that the negative conclusion requires the support of substantial evidence. Such an argument perverts the requirements of the Administrative Procedure Act and would allow the Commission to effectively insulate itself from judicial review.

First, the precise basis for the Commission's ultimate conclusion must be determined. Appellants argue that it is supported by findings that the then-existing variation from normal transit is not significant, that the rule change would not increase car utilization, and

that Appellees have not met their burden of proving the change to be just and reasonable. But these are nothing more than conclusions supporting conclusions. The necessary findings must be sought elsewhere in the Commission's decision.

The lower court correctly determined that the basic underpinning of the Commission's ultimate conclusion was its reliance on section 15a(2) of the Act and its belief that the rule change would result in a loss of traffic to Appellees and a consequent loss of revenue. *Id.* at 609-10. Clearly, there can be no other basis for the Commission's decision. After full briefing, oral argument and a review of the record in its entirety (*id.* at 610), the lower court unanimously determined that "the evidence which the Commission relied on for its decision consisted of testimony from representatives of the four shipper defendants." *Ibid.*

Clearly these findings require the support of substantial evidence. The Administrative Procedure Act does not refer to "negative findings" but specifically provides that an agency order may not be issued

> ". . . except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence." 5 U.S.C.A. §556(d).

The Administrative Procedure Act further provides that all decisions of an agency shall include a statement of

> "(A) findings and conclusions, and the reasons or basis therefor on all the material issues of fact, law, or discretion presented on the record; . . . ." 5 U.S.C.A. §557(c).

The lower court correctly decided that the Commission's decision must include basic essential findings in support of its conclusions and that these findings must be supported by the substantial evidence of record. *Id.* at 609-10. Appellants' contention that the Commission's conclusion that Appellees have failed to sustain their burden of proof need not be supported by essential findings supported by substantial evidence is not in accordance with the law and is without merit. The lower court transferred no burden to Appellants. It determined that the findings relied upon by the Commission in support of its conclusion were without support of the substantial evidence of record and that the decision cannot therefore be upheld. There is nothing novel or unusual here.

II

The Decision of the Lower Court Is in Full Accord With Established Principles of Judicial Review.

Appellants urge that the lower court improperly substituted its judgment for that of the Commission. In support of this assertion, Appellants quote from the opinion below where the court comments on the rule change at issue before the Commission.

The quoted language is nothing more than dicta and does not reflect the specific holding of the lower court.

That court is well aware of the scope of review of Commission decisions and it fully recognized that it must give weight to the expertise of the Commission. *Id.* at 610. After stating the limitations of a reviewing court, the Court went on to specifically hold:

> "With the standards hereinabove enumerated in mind and after a review of the record in its entirety, the court finds that there is not substantial evidence to support the commission's finding that plaintiffs have failed to meet their burden of showing that the new tariff schedule is just and reasonable." *Ibid.*

The quoted language is the holding of the Court, and it is clearly in accordance with established principles of judicial review.

Appellants' reliance on *Consolo* v. *Federal Maritime Comm'n,* 338 U. S. 607 (1966), cited on page 12 of the Jurisdictional Statement, is misplaced. The lower court in that case reviewed the evidence and decided that on the basis of that evidence the Federal Maritime Commission should not have awarded reparations. *Id.* at 618; *Flota Mercante Grancolombiana* v. *Federal Maritime Comm'n,* 342 F. 2d 924, 931 (D.C. Cir. 1964). Here the Court refrained from determining what it believed the Commission ought to have done, and limited its holding to the narrow ground that the Commission's findings are unsupported by substantial evidence.

The lower court correctly found the Appellants' conjectural allegations of traffic diversion to be insufficient to support a Commission finding that Appellees

would suffer a "considerable" loss of traffic as a result of the new rule, referring to this Court's decision in *United States* v. *Chicago, M. St. P. & P. R.R.,* 294 U. S. 499 (1935). In that case, this Court affirmed a lower court order setting aside a Commission decision. The Court held the Commission decision to be deficient for failure to make specific findings as to the extent of the expected revenue loss and whether the alleged impairment of revenues would be trivial or substantial. *Id.* at 508. The Commission decision below suffers the same infirmity and the lower court correctly so held.

III

The Lower Court Correctly Determined That a Remand to the Commission Would Be Fruitless.

Appellants complain bitterly here of the lower court's refusal to remand the case to the Commission, for reconsideration of an evidentiary record already nearly two and one-half years stale. This allegation of error is without merit.

In the District Court, only the Commission and the United States moved the Court for a remand to the Commission. Although given ample opportunity to do so, Appellants decided not to join in that motion or otherwise to support it. The motion was denied and the Commission and the United States have declined to join the appeal here. Thus, the parties with the greatest interest in securing a remand have declined to pursue the matter further. In these circumstances, and in the absence of a request by the Commission or

the United States, a remand by this Court is inappropriate. *Zuber* v. *Allen,* 396 U. S. 168, 196 (1969). If the Commission does not appeal the decision of the lower court, that should be an end to the matter.

Appellants urge that the lower court relied, improperly, on evidence showing that loss of traffic by Appellees would improve their financial position and urge a remand for the Commission to consider the point. Again, Appellants are attempting to direct attention away from the precise holding of the Court below. The Court held there is no substantial evidence to support the Commission's finding that Appellees would experience a loss of *net* revenue by the transit rule change. In so holding, the District Court noted that not only does the Commission's finding lack substantial evidence, it lacks *any* evidence, since the only evidence on this point was evidence which showed to the contrary. Thus, the lower court did not rely on Appellees' evidence that the loss of feed traffic would result in improvement of Appellees' financial position, but simply noted in passing that this was the only evidence of record on this point, thus buttressing the Court's entirely correct holding that there is no substantial evidence to support the Commission's finding that a diversion of feed traffic would result in a loss of revenue to Appellees.

In any event, Appellants only objected to the evidence and did not attempt to rebut it (Tr. 27). The objection was not pressed and is thus waived (49 C.F.R. 1100.87).

Finally, Appellants urge that a remand is necessary to allow Commission consideration of alleged preference and prejudice violations of Section 3(1) of the Act. On consideration of the record before the Commission, the lower court properly declined to remand the case, noting it "would serve no useful purpose" (397 F. Supp. at 610).

In order for the Commission to make valid findings that a particular rate or rule unduly prefers a particular shipper or group of shippers over another shipper or group of shippers, it must first find that "the transportation conditions with regard to the prejudiced and preferred points are substantially similar. (Citing cases)." *Atchison, T. and S.F. Ry.* v. *United States,* 218 F. Supp. 359, 366 (D.C. Ill. 1963). Further, it is well established that undue prejudice and preference must be proven by clear and unmistakable evidence. General declarations as to competition and injury, unsupported by evidentiary facts, are insufficient. *Pie Bakeries, Inc.* v. *Railway Express Agency, Inc.,* 225 I.C.C. 171, 174 (1937).

The lower court reviewed and examined the record in its entirety *(ibid.)* and clearly concluded it contained no evidence upon which to base such findings. There is not a shred of evidence below bearing on the transportation conditions between the alleged prejudiced and preferred points. This deficiency alone renders remand for this purpose useless.

CONCLUSION

Appellants urge that important questions of administrative law are presented by this appeal, yet the administrative agency most concerned with these questions does not consider the questions to be sufficiently significant to warrant appeal.

From the foregoing, it is clear that the District Court's decision is in all respects correct. It is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

The judgment of the District Court should be affirmed.

Respectfully submitted,

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OCTOBER TERM, 1975

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Appellants,

vs.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, ET AL.,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY

BRIEF OF APPELLANTS IN OPPOSITION TO MOTION TO AFFIRM

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FOREWORD

Although the motion to affirm studiously avoids directly meeting the issues presented by appellants' jurisdictional statement, it does serve to make clear that the overriding issue is whether appellants must suffer the consequences of a grossly erroneous decision of the court below because the Commission itself did not appeal. It is common knowledge

that administrative agencies appeal only a limited number of cases decided against them. Whatever the reason, however, for the Commission's decision not to appeal, its failure to do so should not prejudice the rights of appellants, who are the real parties in interest.

I.

Appellants' first point was that the court erred in holding that the Commission's negative finding that appellees had failed to sustain their statutory burden of proof must be set aside in the absence of substantial evidence to sustain it. Appellees fail to meet this contention, but devote this portion of their motion to answering contentions which appellants do not make. Appellants do not argue, as appellees incorrectly state (Mot., p. 7), that the Commission's burden-of-proof finding need not be supported by the necessary subsidiary findings. On the contrary, appellants pointed out (J.S., pp. 6-7, 10) that the Commission's conclusion was supported by numerous findings. Appellees seek to dismiss these findings as "nothing more than conclusions supporting conclusion". (Mot., p. 6) But this is not the case, as can be plainly seen. The Commission did rely on these subsidiary findings in support of its conclusion that appellees had failed to meet their burden of proof.

In any event, the district court did not set the order aside for lack of necessary findings. It set it aside because, in the court's view, the Commission's negative burden-of-proof finding was not supported by substantial evidence. Although appellees deny this under point I, they specifically concede this under point II. (Mot., p. 8) As appellants pointed out, such a holding is anomalous and does not make sense. (J.S., pp. 9-11) Appellees never address this issue.

II.

Appellants' second contention was that the court substituted its judgment for that of the Commission as to the reasonableness of the proposed tariff change. Appellees attempt to meet that contention by arguing that the district court's statement was "nothing more than dicta and does not reflect the specific holding of the lower court". (Mot., p. 7) We submit that the court's own language belies appellees' contention. After finding that the Commission's burden-of-proof finding was not supported by substantial evidence, the court said (J.S., App. pp. 7-8):

> To the contrary, the record reveals by substantial evidence that the burden has been met and that the tariff modification seems just and reasonable under the circumstances.
>
> Therefore, it is the decision of the Court that the order of the Commission concerning these proposed rate modifications issued in May, 1974, is hereby set aside. Further it is our considered judgment that a remand of this case to the Interstate Commerce Commission would not serve any useful purpose.

Such a precise holding cannot be passed off as mere dicta. If that was not the reason why the district court set aside the order and refused to remand the case to the Commission, then it had no reason at all for its decision.

III.

Appellants' third contention was that the district court erred in refusing to remand the case to the Commission. Against that contention, appellees make three arguments.

First, they argue that appellants cannot raise this point because they did not join in the Commission's motion for remand or make a similar motion of their own. The language of the opinion made it abundantly clear that the district court had firmly made up its mind on that point.

Appellants had no obligation to waste time and money on such a vain endeavor, the wisdom of which was confirmed by what happened to the Commission's motion. There is no principle of judicial review that erroneous decisions of district courts cannot be appealed in the absence of a motion for rehearing or amendment of the opinion.

Second, appellees having strongly urged in the district court that their own evidence showed they would be better off if they lost the traffic, and having obtained a specific finding on that point in their favor, now try to disavow both the finding and their own evidence. Their statement (Mot., p. 10) that the court "did not rely on Appellees' evidence that the loss of feed traffic would result in improvement of Appellees' financial position, but simply noted in passing that this was the only evidence of record on this point" is not correct. The court's finding was as follows (J.S., App. pp. 6-7):

> Further, the Court finds no substantial evidence to support the Commission's finding that the rail carriers would experience a loss of revenue by increasing their rates. The only basis for their conclusion in this regard is the unsupported forecasts of the shippers. *To the contrary, the plaintiffs' evidence shows that the railroads have incurred a loss of revenue from the transportation of meal, and this uncontroverted evidence supports their position. It is clearly established that if there should be a diversion of meal traffic as predicted by the shippers, the carriers would actually be in a better financial position than at present.* (Tr. 35, 36; Exhibit 1, p. 13). [Emphasis added.]

Again, the specific finding belies appellees' contention. It shows that the court did indeed rely heavily on such evidence, and that the finding quoted was one of the principal reasons it refused to remand the case to the Commission.

Appellees' statement (Mot., p. 10) that appellants did not rebut that evidence or press their objection to it is likewise incorrect. Appellants rebutted that evidence by cross-examination of appellees' own witness (J.S., p. 15). Appellants also pressed their objection to the evidence, stating, with respect thereto, on page 30 of their brief:

> Protestants renew their objection to this appendix and move to strike it.

Third, appellees argue that, even if the case were remanded to the Commission, appellants could not prevail on the merits on the issue of undue preference and prejudice. Such an argument is irrelevant to any issue here. Whether rates are unduly preferential and prejudicial is for the Commission to decide. (J.S., p. 16).

CONCLUSION

For the reasons above set forth, appellees' motion to affirm should be denied and appellants should be granted the relief prayed for in their jurisdictional statement.

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ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY

MEMORANDUM FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

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ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY

MEMORANDUM FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

Pursuant to Rule 10(4) of the Rules of this Court, appellees the United States of America and the Interstate Commerce Commission submit this joint statement of position.

1. In early 1973 four railroads in the southern territory proposed to increase transit charges on vegetable oil, cake or meal and related articles. Several shippers protested, and the Commission, pursuant to Section 15(7) of the Interstate Commerce Act (24 Stat. 384, as amended, 49 U.S.C. 15(7)), suspended the tariff and ordered an investigation. The Commission found that evidence showed that the higher rates would divert enough traffic to trucks to cause a net revenue loss (J.S. App. 22-23). It also concluded that the proponent

railroads had failed to carry their burden of showing that the proposed higher charges would be just and reasonable (J.S. App. 24). The Commission directed the railroads to cancel the schedules increasing the rates (*ibid.*).

The railroads sought review in a three-judge district court, which set aside the Commission's order (397 F. Supp. 607; J.S. App. 1-8). After discussing the evidence concerning loss of revenue by diversion, the court observed (J.S. App. 7) that:

> there is not substantial evidence to support the Commission's finding that plaintiffs have failed to meet their burden of showing that the new tariff schedule is just and reasonable. To the contrary, the record reveals by substantial evidence that the burden has been met and that the tariff modification seems just and reasonable under the circumstances.

The court acknowledged that the Commission's decision was supported by evidence. It discounted this evidence, however, because it was "testimony from representatives of the four shipper[s]", because "[t]heir statements are predictions, conjectures and opinions of what might happen", and because "they are self-serving" (J.S. App. 6).

The court set aside the Commission's order without remanding the case to the agency, concluding that "a remand of this case to the Interstate Commerce Commission would not serve any useful purpose" (J.S. App. 7-8). The Commission then asked the court to remand the case. The court declined to do so (J.S. App. 27).

2. Although the district court's decision was adverse, we did not appeal for two reasons. First, although the district court declined to remand the case to the Commission for further proceedings, its judgment

does not explicitly preclude the Commission (on its motion or on request of any protesting shippers) from instituting further proceedings, taking new evidence, and making a fresh decision whether the rates in question are just and reasonable. Indeed, the district court would have no power to preclude further proceedings before the Commission. See *United States* v. *Saskatchewan Minerals,* 385 U.S. 94; *Atchison, Topeka & Santa Fe Ry.* v. *Wichita Board of Trade,* 412 U.S. 800, 817-826; cf. 49 U.S.C. 13. The Commission therefore believes that the district court's decision does not inevitably declare that the rates in question are just and reasonable. Second, the decision of the district court purports to turn simply upon the substantiality of the evidence in this particular proceeding, and we believe that it is not necessary to present to this Court for plenary resolution all decisions of this sort, however incorrect they may be.[1]

The shippers have appealed, however, and the case is now before the Court. Although we remain of the view that plenary consideration is unnecessary, we also believe that the district court's decision is patently incorrect. We therefore urge that its judgment be reversed summarily.[2]

---

[1]Congress has taken steps to make review of Interstate Commerce Commission cases less burdensome to this Court. Pub. L. 93-584, 88 Stat. 1917, provides that after February 28, 1975, review of the Commission's orders is in the courts of appeals, with review in this Court by certiorari. The complaint in the instant case was filed before the effective date of this statute and so is governed by the old procedure, which required such complaints to be heard by three-judge district courts and provided for review by appeal to this Court.

[2]Cf. *Northern Indiana Public Service Co.* v. *Porter County Chapter of the Izaak Walton League of America, Inc.,* No. 75-4, decided November 11, 1975, in which we also declined to seek review but suggested summary reversal after the private parties brought the case to this Court.

We agree with appellants (J.S. 9-14) that the district court erred in reweighing the evidence. The district court, although claiming to set aside the Commission's order for want of substantial evidence, in fact simply disagreed with the Commission concerning the weight to be accorded conflicting evidence concerning diversion of traffic (J.S. App. 6-7). Such a disagreement cannot support its decision, for the weighing of testimony is the task of the Commission, not the reviewing court. *Alton R.R.* v. *United States,* 315 U.S. 15, 23.

We therefore respectfully submit that the judgment of the district court should be reversed.

ROBERT H. BORK,
Solicitor General.

ARTHUR J. CERRA,
General Counsel,
Interstate Commerce Commission.

APRIL 1976.

DOJ-1976-04

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1015

RALSTON PURINA COMPANY, ET AL. - *Appellants*

v.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, ET AL. - - - - *Appellees.*

APPELLEES' PETITION FOR REHEARING

Pursuant to Rule 58 of the Rules of this Court, Appellees hereby petition the Court for rehearing of the Court's order herein entered June 14, 1976. As grounds for this petition, Appellees show the Court as follows:

This is an appeal from the judgment of a three-judge District Court setting aside and annulling a decision and order of the Interstate Commerce Commission in *Louisville & N. R.R.* v. *United States,* 397 F. Supp. 607 (W.D. Ky. 1975).

In its decision the Commission held the proposed transit rule change to be unjust and unreasonable on the ground that it would result in a diversion of both feed and soybean meal traffic from the railroads. From this, the Commission concluded would follow "a net loss of revenue to the [railroads] despite the assess-

ment of higher rates and charges and thus will be self-defeating."

Appellees attacked this finding as lacking the necessary support of substantial evidence of record. Appellees' attack is based upon the fact that the conclusion as to loss of revenue *can only relate to a net loss of gross revenue.* The first part of the Commission's conclusion only states that the railroads will lose the gross revenue from the traffic lost. Certainly, the railroads concede that if traffic is lost, there will be a loss of gross revenue on such traffic as may be diverted. The railroads do not concede, however, that the loss of such revenue will be "self defeating," as stated by the Commission. The conclusion that the loss of gross revenue will be self-defeating *assumes* that the traffic lost is profitable traffic and that its loss will result in a dimunition of profits to the railroads. This assumption goes to the very heart of the Commission's conclusion, for without it there is no basis for the assertion that the rule change will be "self defeating." It is this assumption that is completely without evidentiary support in the record before the Commission, and it is for this reason the Commission's decision must fail to meet the requirements of the law.

The lower court correctly recognized this fatal defect in the Commission's conclusion. *Ibid.* at 610. The lower court found there to be no evidence to support a conclusion that there would be a loss of profits should there be a diversion of traffic as predicted. The lower court went on to find that the *only* evidence on the profitability of the traffic was uncontroverted (*ibid.*)

and showed the loss of feed traffic would be helpful to the railroads, since such traffic is unprofitable.

This Court reversed the lower court on the ground that the lower court reweighed the testimony and thus exceeded its function. Appellees submit this Court erred in that decision. This Court's reasoning suffers the same deficiency as the Commission's ill-founded conclusion: it assumes, without evidence, that a loss of traffic and thus a loss of *gross* revenue will also result in a loss of profits. There is simply no evidence in the record below to show that the traffic is profitable. The only evidence on profitability was introduced by Appellees and that evidence related to the feed traffic only because the proposed rule change relates only to feed. That evidence shows that feed traffic is unprofitable to Appellees. Appellants introduce *no* evidence in rebuttal and this evidence of unprofitability stands. Further, there is *no* evidence below as to whether the meal traffic is profitable or unprofitable. Yet the Commission's conclusion, to be valid, *must* assume that the meal traffic is profitable, since it cannot possibly be asserted that the feed traffic is profitable. Thus, the key to the Commission's conclusion (and this Court's affirmance thereof) is the totally unfounded assumption that a loss of meal traffic will result in a loss of profits to the railroads. It is this assumption that is totally lacking the requisite support of substantial evidence. This is so because there is no evidence whatsoever on the question of meal traffic profitability. The Commission's conclusion and assumption, therefore, cannot possibly be supported by substantial evidence because

there is simply no evidence on the point. This is the precise holding of the lower court (*ibid.*) and it is correct in all respects. On the record below, there could be no other holding. The lower court did not rely on the Appellees' evidence to disagree with the Commission. The lower court simply referred to Appellees' uncontroverted evidence as to unprofitable feed traffic in holding that there was no substantial evidence before the Commission to support a contrary assumption. It would appear that this Court mistakenly viewed the lower court's reference to a complete lack of evidence as to loss of profits as if the lower court weighed the evidence. The lower court could not have weighed the evidence as to profitability of meal traffic since there is no evidence on this point. As to the feed traffic, the lower court simply found that the *only* evidence as to profitability was Appellee's and it showed the traffic to be unprofitable. Surly, the lower court cannot be held to have weighed evidence when such evidence is unrebutted.

The holding and language of the lower court are very similar to the decision in *Malone Freight Lines* v. *United States,* 143 F. Supp. 913 (N. D. Ala. 1956). In that case the Commission ordered the plaintiff motor carrier to maintain a rate on certain commodities higher than the rail rate on the same commodities, finding the rail rate just and reasonable and the proposed lower motor carrier rate unjust and unreasonable. On appeal, the district court held the finding as to the motor carrier rate to be unsupported by the evidence, stating:

> "The latter finding [as to the motor carrier rate] is not only not sustained by the evidence but is contrary to the evidence. There is no basis in the evidence for the application of different rates. The evidence sustains the plaintiff's proposed $1 rate as just, reasonable and compensatory. The conclusions of the Commission to the contrary are not supported by substantial evidence, and from a review of the whole evidence the court concludes that a judgment should be entered (permanently enjoining the Commission decision)." *Ibid.* at 916.

This case has not been reversed or overruled. The similarities between the above-quoted language and the opinion of the lower court here are striking. In both cases, it is clear that the court determined that the Commission's decision lacked the support of substantial evidence. That is the essential holding insofar as the court is concerned. But both courts understandably went on to note that the Commission finding was contrary to the evidence. This does not mean the courts weighed the evidence. Rather, it simply shows the courts' familiarity with the record. It is quite natural, in the absence of *any* evidence to support a finding, to say that the finding is contrary to the evidence, as was done by both the lower court here and the court in the *Malone* case. The lower court did not reweigh the evidence. It simply found no evidence to support the Commission's conclusion and went on to note that the finding was indeed contrary to the only evidence of record on that particular point.

An affirmative assumption as a part of a Commission conclusion must have the support of substantial

evidence in the record before the Commission. *Florida* v. *United States,* 282 U. S. 194 (1941). Here a Commission conclusion hinges solely upon an assumption of profitability on which there is no evidence below. Thus, the entire conclusion must fall as lacking the support of substantial evidence.

For the foregoing reasons, Appellees respectfully petition this Court to rehear this matter and, on rehearing, enter an order affirming the judgment of the three-judge Dstrict Court setting aside and annulling the decision and order of the Commission.

Respectfully submitted,

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July, 1976

CERTIFICATE OF COUNSEL

As Counsel for Appellees, I hereby certify that this Petition for Rehearing is presented in good faith and not for delay.

/s/ Fred R. Birkholz

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